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Nos. 176 and 177

IN THE

Supreme Court of the United States

October Term, 1967

HOWARD PRICE, D/B/A HOWARD PRICE AND COMPANY
Appellant

v. (No. 176)

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, AND BURL A. SAWYERS, AS STATE ROAD COMMISSIONER
Appellees

R. C. WETHERALL, JR. AND PAUL PRICE
Appellants

v. (No. 177)

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, and BURL A. SAWYERS, AS STATE ROAD COMMISSIONER,
Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

PETITION FOR REHEARING OF ORDER DISMISSING APPEAL AND UPON TREATING AS PETITION FOR CERTIORARI, DENYING THE WRIT

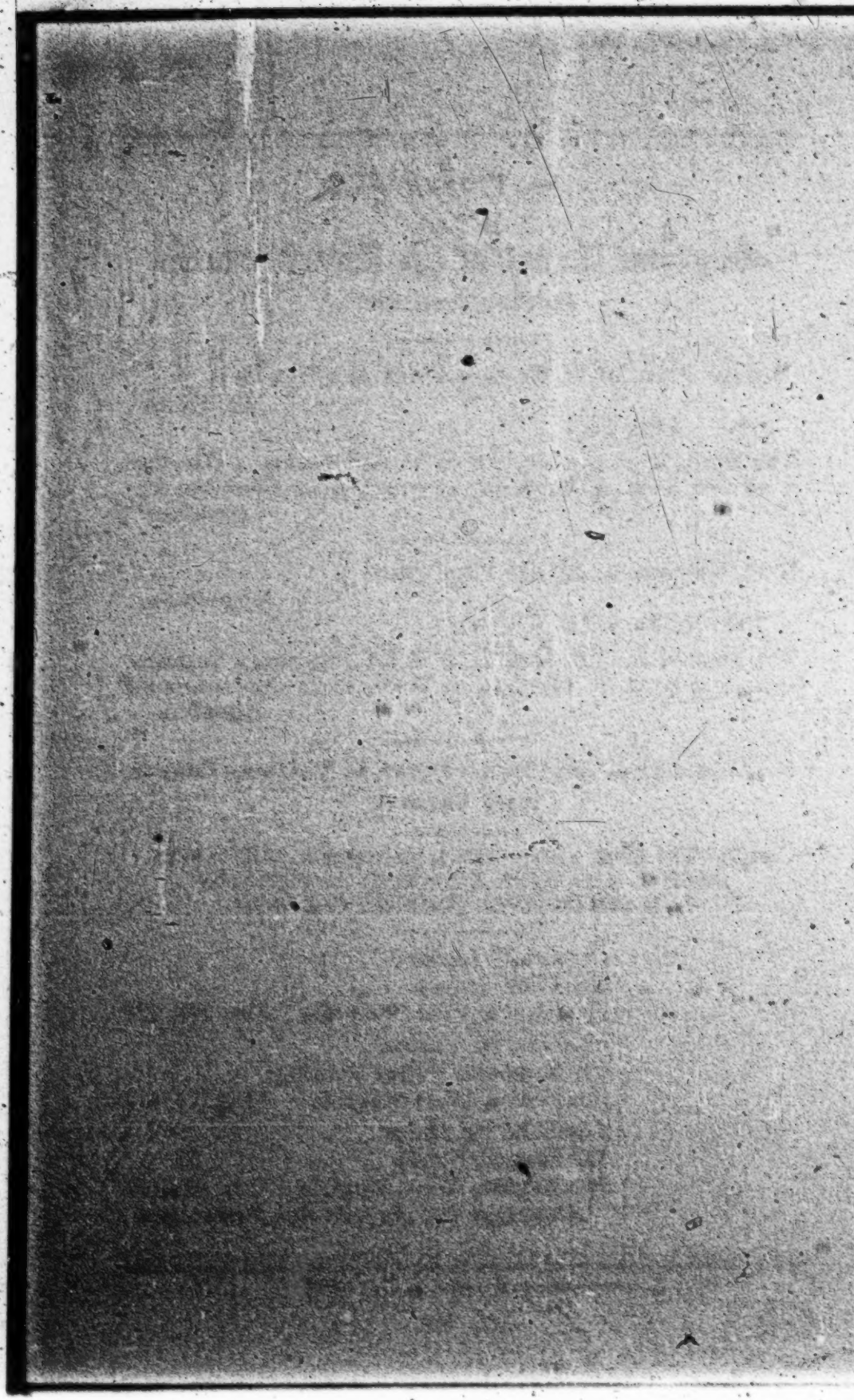
CARNEY M. LAYNE
638 Fifth Avenue
Huntington, West Virginia Nos. 176, 177

CHARLES W. YEAGER
608 Kanawha Valley Building
Charleston, West Virginia Nos. 176, 177

JAMES W. ST. CLAIR
523 Seventh Street
Huntington, West Virginia No. 177

Attorneys for Appellants—Petitioners

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.



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Appellants respectfully request that this Court grant rehearing of its order of October 9, 1967, which dismissed the appeals, and having treated the papers as petitions for certiorari, denied certiorari, and that the Court now grant writs of certiorari.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRITS

The West Virginia Court of Claims came into existence on July 1, 1967, during the pendency of these appeals and after the filing of the Jurisdictional Statements. Its existence was relied upon in Appellees' Motions to Dismiss as a "court" which could furnish Appellants an adequate state remedy. Appellants' Jurisdictional Statements were oriented to due process under the Fourteenth Amendment, and this intervening circumstance makes pertinent questions arising under the civil rights statute (R.S. 1977, 1979; 42 USCA Sec. 1981, 1983), and under the equal protection clause of the Fourteenth Amendment, which were available to Appellants but not presented.

The constitutionality of this court of claims and its acts has not been established in any court. A previous court of claims existed in West Virginia in 1941 to 1953 and was abolished. It had been held not to be a judicial body but a legislative body only, whose function was entirely recommendatory on moral obligations only, without judicial review, and dissimilar to the U.S. Court of Claims, (*State* v. *Simms*, 127 W.Va. 786, 34 SE 2d 585), which is a court of judicial powers (*Pope* v. *U.S.*, 323 U.S. 1). The new court of claims is subject to attack on constitutional and other grounds and offers Appellants no assurance of any ultimate relief.

Appellees obtained dismissal by this Court of Appellants' first appeals upon the representation that the immunity provision could not be invoked against the suggested remedy of mandamus. They then invoked such immunity when Appellants instituted those mandamus proceedings. On this second appeal Appellees sought dismissal upon the representation that the immunity provision cannot be invoked against the Court of Claims procedure. It must be assumed that once judicial proceedings are dismissed and Appellants are rele-

gated to the Court of Claims, Appellees will again play "fast and loose" with this Court and again assert the immunity provision on the ground Appellants are estopped to deny the legal nature of their rights and that such Court cannot hear the claims, since as legal claims (as distinguished from "moral obligations") they are within the prohibition of the immunity provision, and expressly excluded from consideration by the Court of Claims by the creating act. This litigation, through two separate proceedings and two appeals to this Court, in each case, has consumed 4½ years on the sole question of seeking a remedy not interdicted by the immunity provision.

DENIAL OF EQUAL PROTECTION OF LAW

The Road Commission and Commissioner have a right to sue contractors in the State Courts on matters involving contracts and construction thereunder. By virtue of the immunity provision, contractors, however, under the trial court's holding cannot have such a right against the Commission and Commissioner. If it were determined that the court of claims is validly established, its remedy, being advisory and only for a legislative grace that may be ultimately given or withheld, and without appeal, is a separate *but not an equal remedy;* it cannot afford equal protection. It is the lack of judicial remedy which constitutes a denial of the equal protection of the laws guaranteed by Section 1 of the Fourteenth Amendment.

DENIAL OF CIVIL RIGHTS

The rights sought to be enforced by Appellant are civil rights encompassed under the Civil Rights Statute (42 USCA 1981, 1983). They give Appellant a *federally cognizable cause of action* the same as was involved in *Parden* v. *Terminal Railway of Alabama State Docks Dept.*, 377 U.S. 184, and against which it was held that the Alabama constitutional immunity provision, *identical to that of West Virginia,* could not be invoked.

The mandamus petitions contain the essential allegations under the statute and expressly set forth Appellees' wrongful and arbitrary actions under color of law, (*Monroe* v. *Pape*, 365 U.S. 167). By such actions themselves, Appellees have subjected, and by the invocation of the constitutional immunity provision on the institution of these mandamus proceedings, caused Appellants to be subjected, to the deprivation of their rights. A constitutional provision is within the ambit of 42 USCA 1983. (*Giles* v. *Harris*, 189 U.S. 985). A litigant will not be relegated to a court of claims on a showing of arbitrary action. (*Land* v. *Dollar*, 330 U.S. 731).

The exhaustion of state remedies is not prerequisite to assertion of Appellants' rights under the cause of action created by the Civil Rights Statute. *McNeese* v. *Board of Education*, 373 U.S. 668; *Monroe* v. *Pape*, supra.)

Four other states have rigid constitutional immunity provisions identical to that of West Virginia. Eleven states have a claims procedure which allows for judicial review. Twenty-six states allow actions in their regular court systems.[1] The civil rights statute does not admit of variance between the states. (*Basista* v. *Weir*, 340 F2d 74). Approximately 80% of the states have waived immunity on highway contract claims[2].

Civil rights may be vindicated by any suitable remedy (42 USCA 1988), and if necessary, this Court may fashion a remedy for their protection (*Woods* v. *Nierstheimer*, 328 U.S. 221), and state procedural remedies may be adopted for such purpose as part of the federal law (*Textile Work-*

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[1] Jenkins, Public Contract Remedies in the United States at the State and Local Level, A.B.A., Vol. 1 Public Contracts Law Jour. It is estimated over 200 articles and notes dealing with immunity have been written since the turn of the century, Note 37, Schultz, "Ohio Sovereign Immunity: Long Lives The King", 26 Ohio St. LJ p. 80.

[2] First Annual Report of American Road Builders Associations Task Committee on Highway Claims, March 31, 1967.

ers v. *Lincoln Mills*, 353 U.S. 448). Mandamus to compel the institution of an eminent domain proceeding, and an eminent domain proceeding itself, are such remedies in this case.

CONCLUSION

For the reasons set forth above and in the Jurisdictional Statements it is urged that rehearings be granted, and that upon such rehearings and treating the papers whereon appeals were taken as petitions for certiorari, writs of certiorari issue to the Circuit Court of Kanawha County, West Virginia.

Respectfully submitted,

CARNEY M. LAYNE
638 Fifth Avenue
Huntington, West Virginia Nos. 176, 177

CHARLES W. YEAGER
608 Kanawha Valley Building
Charleston, West Virginia Nos. 176, 177

JAMES W. ST. CLAIR
523 Seventh Street
Huntington, West Virginia No. 177

Attorneys for Appellants—Petitioners

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

CHARLES W. YEAGER
608 Kanawha Valley Building
Charleston, West Virginia
Of Counsel for Appellants-Petitioners

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WETHERALL ET AL. *v.* STATE ROAD COMM'N OF WEST VIRGINIA ET AL.

APPEALS FROM THE CIRCUIT COURT OF WEST VIRGINIA, KANAWHA COUNTY.

Nos. 176 and 177. Decided October 9, 1967.

PER CURIAM.

The motions to dismiss are granted and the appeals are dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari is denied.

THE CHIEF JUSTICE and MR. JUSTICE BRENNAN are of the opinion that probable jurisdiction should be noted.